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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

v.

ALLAN BAKKE

On Writ of Certiorari to the Supreme Court of California

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE* *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, nine past Presidents of the American Bar Association, two former

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* The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 42(2).

Solicitors General, a number of law school deans and professors, and many of the nation's leading lawyers. Through its national office in Washington, D.C. and its offices in Jackson, Mississippi and eight other cities, including two in California, the Lawyers' Committee over the past fourteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The Lawyers' Committee has a number of vital interests at stake in this case, the correct interpretation and application of the Fourteenth Amendment being foremost among them. The Fourteenth Amendment's promises of racial equality have received meaningful attention for only a small part of the Amendment's 110-year history, and those promises are far from being fulfilled. During the past two decades the law has developed its apologia for the fact that "for many years after Reconstruction, the Fourteenth Amendment was almost a dead letter as far as the civil rights of Negroes were concerned Its sole office was to impede state regulation of railroads or other corporations." [1] In the case at bar, the California Supreme Court, in holding that the Fourteenth Amendment prohibits a state medical school's affirmative admissions program designed to bring racial equality into the medical profession, has again diverted the Amendment from its intended course. The Amendment cannot

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[1] *United States* v. *Price*, 383 U.S. 787, 801 n.9 (1966). *See generally Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 576-81 (1949) (Douglas, J., dissenting); *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 85-90 (1938) (Black, J., dissenting); Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 Yale L. J. 371 (1937).

and should not sustain another major diversion, such as that portended by the judgment below.

The Lawyers' Committee has litigated a number of Fourteenth Amendment cases resulting in remedial orders directing state and local governments to utilize race-conscious means to eradicate the persisting manifestations of long-standing official racism, *see, e.g.*, *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir.) (*en banc*), *cert. denied*, 419 U.S. 895 (1974), and we have negotiated a number of consent decrees providing for similar relief. *See, e.g.*, *Arnold* v. *Ballard*, C.A. No. C-73-478 (N.D. Ohio, consent decree entered Sept. 20, 1976). While the California Supreme Court's decision in the instant case does not directly affect the validity of such remedial orders (*see* Pet. App. pp. 29a-32a), the rationale of that decision, if affirmed by this Court, would present serious practical obstacles to our efforts to secure such relief through the courts and, especially, through the negotiation process.

Finally, the detrimental impact of the decision below on the accessibility of graduate and professional school education, and ultimately the professions themselves, to members of minority groups is of vital concern to us—particularly as that impact affects the racial composition of the legal profession, a concern which we expressed in our *amicus* brief in *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). Since 1970 we have operated through our Mississippi office a Minority Lawyer Leadership, Training and Development Program, the purpose of which is to help develop an economically viable private black bar able and willing to respond to the special and general needs of Mississippi's black residents. Under this continuing program at least nine young black attorneys have successfully established private practices in Mississippi towns which previously had few or no black lawyers. The continued success of this program obviously

depends on the availability of black law-school graduates, which in turn heavily depends on the continuation of special admissions programs such as the one invalidated by the court below. Affirmance of the decision below would impede our Mississippi program, and it would negate the small steps that have been taken throughout the nation to diversify the bench and bar by opening the profession to minorities.

Accordingly, the Lawyers' Committee files this brief as friend of the Court urging reversal.

INTRODUCTION AND SUMMARY OF ARGUMENT

What is involved in this case is a special admissions program adopted by the faculty of a state medical school to bring racial diversity to a student body and to a profession that would otherwise continue virtually all-white for an indefinite period.

The goal of such a program is fully consistent with the history and aims of the Equal Protection Clause. It reflects a great national purpose, exhibited in federal and state appointment policies, a wide range of legislation, and innumerable job programs, as well as similar admissions policies of countless educational institutions, to bring racial diversity to all segments and all levels of American life. The program also serves sound educational policies reflecting the considered professional judgment of the distinguished institution that adopted it, and the needs of the profession that institution represents and serves.

The developed constitutional doctrine of the Equal Protection Clause is not so rigid as to prohibit the states from adopting such programs. It is plain from such cases

as *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 97 S. Ct. 996 (1977), and *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971), that the states are not barred *per se* from taking race into account in devising and implementing state policies in which factors of race are inextricably implicated. Where scarce and valuable state resources (such as jobs, or places in professional schools) are at issue, such policies may inescapably, and at random, damage the economic interests of individual members of nonminority groups. That is a transitional inequity that is the cost of permitting such programs, but it should not alone invalidate them, compare *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), absent any element of racial oppression, of perpetuation or protection of preferred positions, or of invidious discrimination against any group. None of these factors is present here, and the state's program should accordingly stand.

ARGUMENT

I. Special Admissions Policies, Such As That of Davis, That Are Designed to Increase Minority Matriculation Into Professional Schools Serve Sound Educational Needs and Basic State and National Interests.

What the Supreme Court of California has done here is to interpret the Fourteenth Amendment[2] to forbid a state university from implementing student admissions policies that are designed essentially to bring racial diversity to the virtually all-white populations that might otherwise exist in professional schools, and in the professions for which they train their students. That is the fundamental, dominant purpose of the Davis special admissions program for "disadvantaged" applicants. If the Amendment truly requires this result, it must be because the process of constitutional litigation has frozen

[2] The trial court held that the Davis special admissions program also violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Privileges and Immunities Clause of the California Constitution, Art. 1, § 21. (Pet. App. p. 117a). That court's holding as to the California Constitution accordingly constitutes an independent and sufficient non-federal ground for its injunction. The Supreme Court of California, however, did not address itself either to the statutory or the state constitutional issue, and neither party here has raised a question as to this Court's jurisdiction. It is, of course, true in general that the existence of a potential non-federal ground for the decision of the highest court of a state does not defeat jurisdiction here where the state court does not consider the potential state ground. *See, e.g., Grayson* v. *Harris*, 267 U.S. 352, 358 (1925). Since the judgment of the trial court would be left standing in this case whatever the disposition of the federal ground, however, the procedure followed in *Paschall* v. *Christie-Stewart, Inc.*, 414 U.S. 100 (1973), seems possibly applicable. We do not urge the Court to follow that route because we believe, first, that the petitioner is entitled to a reversal of the court below on the federal constitutional ground on which its decision rests, with the state constitutional issue then left to the California courts for disposition, *see* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM, 478, 458 (2d ed. 1973); and, second, that the federal constitutional issue presented needs to be finally decided by this Court.

construction of the Amendment into a rigid pattern of doctrine that outlaws state action designed to achieve racial equality and justice, the Amendment's most basic purpose.

Section II of our argument demonstrates that the Court's decisions do not establish any such pattern. This section is intended simply to show that the kind of admissions program used by Davis is a reasonable and rational way, well within the area of discretion that it should be allowed, for an educational institution to deal with the danger of perpetuation of a professional caste system.

A. *The State's Decision to Increase Minority Matriculation in Its Medical School Is Constitutionally Permissible.*

In the first place, it is reasonable for a professional school to decide that it wants, for its own purposes and own educational needs, to have significant racial diversity in its student body and its faculty. The damage done by racial segregation in educational institutions is at least not necessarily limited to that inflicted on the excluded minority group. White students need the diversity of experience and professional interests that may come only from sharing the educational process with blacks and other minorities. This could reasonably be supposed by educators to contribute to innovation in the development of research priorities, curriculum, and other academic insights. The law schools are responsive to educational needs that they did not perceive before the institution by many of them of special admissions programs similar to that adopted by Davis for medical students, and it is certainly at least plausible, and not unreasonable, for those responsible for the educational programs at those schools to believe that the two facts, of diversity and innovation, are not unrelated. In like vein,

it is surely not arbitrary for medical schools to conclude that their educational program will be enriched by the presence of racial diversity in their student bodies.

Second, it is also reasonable for a professional school, especially a state institution supported by public moneys, to decide that it has an educational responsibility to prepare a racially diverse group for the profession. Race is, in fact, an important factor for the doctor or lawyer in choosing what kind of practice to pursue, in what location, and for the custom of what kinds of clients. Further, doctors perform important functions in determining priorities and modes for the delivery of health services, as lawyers and judges do for legal services. In all the varieties of judgments that need to be made in such matters, it is certainly not irrational to believe that racial diversity is desirable, indeed essential. Nor is it inconsistent with known facts to think that clients to be served by the professions, particularly the poor, the under-represented, and the disadvantaged, deserve the choice of the opportunity of consulting with racially identifiable doctors or lawyers they believe will best understand and sympathize with their problems; it is certain that race has, in fact, played an enormously important role in their own lives.

Third, it would be reasonable for educators to conclude that a special admissions program was essential to achieving these ends, at least for a transitional period of uncertain duration. The only evidence in the record on the point is to that effect: "In the judgment of the faculty of the Davis Medical School, the special admissions program is the only method whereby the school can produce a diverse student body which will include qualified students from disadvantaged backgrounds." (Testimony of admissions committee chairman; Pet. App. p. 75a). As the *amici* briefs filed in this case demonstrate, a large number of other private and state pro-

fessional schools have reached similar judgments. As to law schools, these judgments are reinforced, although not necessarily proved correct, by a May 1977 study of applications and admissions to ABA accredited law schools.[3]

B. *The Means Used Are Also Permissible.*

To be sure, a state institution cannot accomplish even these appropriate ends through unconstitutional means. The majority of the Supreme Court of California apparently concluded that that was what Davis had done here. Yet, as we show in section II, there are no sufficient countervailing considerations of constitutional dimensions created by the type of special admissions program adopted by Davis to place it outside the parameters of permissible state action. We show in section III that neither do such obstacles arise from the details of the specific plan they have chosen to adopt. Here we simply point out that the means used are entirely reasonable.

First, there is no merit to the assumption of the court below that special admissions programs designed to increase minority matriculation in professional schools are

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[3] Educational Testing Service, *Applications and Admissions to to ABA Accredited Law Schools*, (May, 1977, copyright by Law School Admission Council; mimeographed; Educational Testing Service, Princeton, N.J. 08540). The fact is that not enough is known about why minority applicants statistically make lower scores on such intended objective tests as the MCAT (for medicine) and the LSAT (for law). In summary, however, the Educational Testing Service analysis referred to does show that admissions policies based solely or predominantly on the predictors measured by the LSAT and related quantifiers would operate severely to limit access to legal education and the profession by blacks, Chicanos, and possibly members of other minority groups. *Id.* at pp. xiii, xvi-xviii. One statistic cited by the analysis is that of 1539 black Americans admitted to 129 ABA approved law schools in 1976, only 285 would have been admitted if their ethnic identity had been unknown, according to the judgment of the law schools admitting them. *Id.* at 64, Table 26. It goes without saying that the effects would be greatest in the best and most prestigious professional schools, such as the University of California Medical School at Davis.

valid only if color-blind and implemented without express or implicit consideration of race.

By such a program, a university aims to integrate its student body and the profession generally, and to alleviate the medical problems of the minority community. It is hard to see how the state's concededly racial goals can be achieved equally well if the state ignores race. To insist that it do so is to condemn it to bad faith, or to the adoption of a grossly ineffectual means to its end.

The alternatives to explicit racial classification most frequently urged are programs that focus on disadvantaged persons generally. Such programs, it is argued, permit a university to achieve racial goals indirectly, since some or many of the disadvantaged admittees will be minorities. The first vice of these programs is that they are ineffectual. They would force universities to admit large numbers of disadvantaged students in order to obtain the number of minority students they regard as optimal. One commentator has estimated in connection with *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), that, in order to achieve in a racially neutral way the state's goal of approximately 15% minority representation in the student body, the University of Washington Law School would have had to use special admissions criteria for 40-50% of its class. Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U.Chi.L.Rev. 653, 690 n. 113 (1975).

A second vice of this alternative is its disingenousness. The University's goal is integration. To select a racially "neutral" criterion for the purposes of promoting integration cannot honestly be described as a "nonracial" decision. To suggest that the University may accomplish *sub rosa* what it is constitutionally prohibited from ac-

complishing *de jure* is to invite, not without irony, the very evasiveness that has hindered the implementation of *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

The court below also suggested that "the University might increase minority enrollment by instituting aggressive programs to identify, recruit, and provide remedial schooling for disadvantaged students." 553 P.2d at 1166 (Pet. App. p. 26a). Yet this suggestion is afflicted with the same vices as its predecessor. If recruiting and remedial programs focus on disadvantaged students generally, they are an ineffectual and disingenuous means to a racial and ethnic end. If such programs focus on minority students in particular, they simply move the racial preference one step away. Exceptional measures taken to prepare minorities for a competitive admissions process prefer them as surely as does a preference in the admissions process itself.

Second, it is also not true, as the court below seems to believe, that special admissions programs abandon the principles of merit and achievement for a nakedly racial goal. They do not involve racial quotas in the sense that race is substituted as a sole standard for some percentage of the students to be admitted. No doubt one reason for the need for special admissions programs is the absence of sufficiently sophisticated admissions standards that can accurately identify the members of a student body that will adequately reflect the diverse and various needs of the educational institution and the profession for which it trains. Probably no such standards can be created to choose from among 1000 to 1500 applicants, all of whom appear to be qualified for the academic demands they will face. Yet it is clear that the MCAT (for medicine) and LSAT (for law) scores, and college grades that go with them, do not purport to measure probable merit or achievement in a profession, but only serve as statistically accurate predictors of good grades in the first two or

three semesters in a school. It is not at the sacrifice of the goal of turning out good lawyers and doctors, but only at the potential sacrifice of more predictable early academic performance, that special admissions programs are put in effect.

Third, it is perfectly apparent that there is no smell of oppression present in such programs. Their guiding principle is inclusion, not exclusion. Whether wise or not, the programs are reasonable responses to educational, professional, and societal needs for full minority participation in the learned professions. They contain no hint of a majority, or a politically dominant group, attempting to protect itself or its own prior positions or perquisites from inroads by insurgent minorities. Compare Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U.Chi.L.Rev. 724 (1974). They are instead transitional steps, pending the achievement of a more complete racial equality in the professions, which the political process can be counted on to abolish when the felt need for them no longer exists.

The fact that a scarce resource—admission to a limited student body, membership in which is valuable—is involved does not by itself invalidate the program, even though that fact necessarily means transitional inequities will occur to the disadvantage of some individuals such as respondent, who are not members of the groups that are the targets of special admissions programs. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), this Court ordered the granting of seniority relief to members of a class (black nonemployee applicants) who were denied jobs by reason of discriminatory hiring practices taking place after the effective date of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* It did so despite explicit claims that the district court had denied such relief, in the exercise of its equitable discretion, because it believed the award of such relief would conflict with the economic interests of white employees. 424 U.S. at 773-779. No constitutional claim was raised, but it would make no constitutional sense to say that a federal statute could permissibly require that result, while the Fourteenth Amendment forbade a state from doing the same thing voluntarily.

This Court's decisions afford no basis for concluding that it makes a constitutional difference whether a special admissions program such as that used by Davis serves a specific remedial purpose, parallel to that in *Franks* v. *Bowman Transportation Co.*, *supra*, or other legitimate state needs. *See* discussion, pages 19-20 *infra*. It is sufficient to emphasize at this point that the specific educational and professional purposes identified above are reinforced constitutionally because they also serve plain concepts of compensatory and corrective justice that are recognized to lie at the core of the Fourteenth Amendment. They are efforts, probably the most significant efforts institutions of higher education could make, towards a solution of the nation's most intractable problem, which is its heritage from years of institutionalized, legally enforced, socially accepted, and invidiously pervasive racial oppression, with its enduring debris.

II. The Equal Protection Clause Does Not Require This Court to Forbid the Implementation of Such Policies by State Institutions.

The appropriate state institution—the medical school with the function of producing doctors—has made its judgment here as to the standards by which it should choose its student body from among a large pool of qualified applicants most of whom must be rejected. These standards include considerations of race. As we have shown, the reasons that justify the university's decision to do so are founded on sound principles of higher education, the requirements of the medical profession, and state and national traditions of justice.

It is, of course, recognized that the Court will not invalidate the state's judgment on these matters because the Court would not necessarily make the same judgment itself. The question is whether the state's judgment is permissible under the Equal Protection Clause. In summary, we believe that it is evident that the state's judgment may not be invalidated, under the decisions of this Court, merely because race was taken into consideration. The use of racial criteria by the state for any purpose should indeed be given close scrutiny, but such use is essential for some purposes, including the desegregation of school systems. It is permissible here because it does not cast a stigma on anyone, because the affected class is not entitled to extraordinary judicial protection, and because there is a showing of sufficient need for the use of the racial criteria. We recognize that the effect is to impose costs on some individuals who do not meet the racial criteria used. That is why the case is here; it is the inescapable consequence of any system of allocating scarce resources that includes the use of racial criteria. We do not believe that the existence of such costs is sufficient to make the use of such criteria impermissible.

Plaintiff does not contend that he was denied admission to the medical school because of the University's discrimination against him as a white, or against whites generally. Nor can he accurately claim that he was denied admission to the special admissions program because of his race. Rather, and the distinction is a crucial one, his complaint runs against the University's decision to fill a number of places in its entering class with minority applicants through the special admissions program, thus making fewer places available through the regular admissions process. His case, in other words, depends not on a showing of discrimination against him, which could not be made, but on claimed incidental damages to him from

benefits, or preferences, given a minority group. Unless the state is forbidden all programs conferring any such preferences, therefore, the claim fails.

A. *The Purpose of the Special Admissions Program Is Permissible Under the Fourteenth Amendment Because It Does Not Stigmatize any Person or Class of Persons Because of Race.*

The parties and some of the *amici* may join issue on whether the discrimination allegedly inherent in the special admissions program is purposeful or intentional within the contemplation of this Court's decisions in such cases as *Washington* v. *Davis*, 426 U.S. 229 (1976). *See, e.g., Castaneda* v. *Partida*, 97 S. Ct. 1272 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 97 S. Ct. 555 (1977); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973). To the extent that the "purpose or intent" standard is in need of further refinement, *cf. Washington* v. *Davis*, 426 U.S. 229, 253-54 (Stevens, J., concurring); *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 97 S. Ct. 996, 1017 (1977) (Stewart, J., joined by Powell, J., concurring); Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 87 Yale L.J. 317 (1976), the need is not presented by this case. The precise question here, rather, is whether the explicit racial purpose of the special admissions program is an impermissible one. We show that it is not.

As the Court has recently held, the "deliberate" use of race "in a purposeful manner" as one criterion of choice is not constitutionally invalid where such use represents "no racial slur or stigma with respect to whites or any other race." *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, *supra*, 97 S. Ct. at 1009 (plurality opinion). The remedial nature of the special admissions program, designed to integrate rather than to segregate,

and its enactment by a majority-race decision-maker "belie the possibility that the decision-maker intended a racial insult or injury to those [members of the majority] who are adversely affected by [its] operation. . . ." *Id.* at 1016 (Brennan, J., concurring in part).[4] The court below specifically held that whites "are not . . . invidiously discriminated against in the sense that a stigma is cast upon them because of their race." 553 P.2d at 1163 (Pet. App. p. 19a). Moreover, there is no claim that the special admissions program causes, or is the result of, any animus against a discrete group within the majority. *Cf. United Jewish Organizations, supra*, 97 S. Ct. at 1014, 1016 n. 7 (Brennan, J., concurring in part).

The purpose of the special admissions program, therefore, is not impermissible under the Equal Protection Clause. This conclusion is bolstered by the fact that the class against which the program allegedly discriminates is not a class entitled to extraordinary judicial protection under the Fourteenth Amendment, our next point.

B. *The Class to Which Plaintiff Belongs Is Not Entitled to the Extraordinary Judicial Protection Afforded "Discrete and Insular" Minority Groups.*

The notion that racial classifications in certain contexts are presumptively unconstitutional derives from a special judicial solicitude for the fate of historically disadvantaged minority groups. Strict scrutiny of state actions which affect "suspect classes" is a deviation from traditional judicial deference to the judgments of other gov-

[4] In *Castaneda* v. *Partida*, 97 S. Ct. 1272, 1282 (1977), the Court, considering the question of discrimination from an evidentiary perspective, deemed it "unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group." Here, by contrast, the question is not one of proof but of justification. The Court acknowledged that distinction in *Castaneda* by its reference to "a case where a majority is practicing benevolent discrimination in favor of a traditionally disadvantaged minority." *Id.* at 1282 n. 20.

ernmental agencies which occurs when history has proven the futility of reliance upon such agencies to secure equal treatment for a "discrete and insular" minority group. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938). *See also Hernandez* v. *United States*, 347 U.S. 475 (1954), and *Graham* v. *Richardson*, 403 U.S. 365 (1971). The nonminority applicants who would have been admitted to the medical school at the University in the absence of the special admissions program hardly qualify for this extraordinary judicial aid. The majority below acknowledged that "the white majority is pluralistic, containing within itself a multitude of religious and ethnic minorities." 553 P.2d at 1163 (Pet. App. p. 19a). There has not been—nor could there likely be—any demonstration that this class has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 28 (1973). *See also Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976); *Craig* v. *Boren*, 97 S. Ct. 451, 464, n. 1 (1976) (Stevens, J., concurring). Rather, this class represents the same kind of "large, diverse and amorphous" group which this Court found *not* entitled to extraordinary judicial protection in the *Rodriguez* case, *supra*. *See also* Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107 (1976).

It has been suggested that one of the particular dangers in the use of race as a factor in the allocation of scarce resources is that "discrete and insular" subgroups among the majority will be called upon to bear a disproportionate part of the "immediate direct costs of benign discrimination." *United Jewish Organizations, supra*, 97 S. Ct. at 1014 (Brennan, J., concurring in part). The dissenting justice below noted this concern, and pointed out that "there is . . . absolutely no indication in the in-

stant record that the special admission program at Davis was instituted to discriminate against a particular subclass of non-minorities, nor is there any claim that the program had in fact such a differential impact." 553 P.2d at 1183 n.10 (Pet. App. p. 61a n.10).

C. *The Use of Racial Criteria by the State in Allocating Scarce Resources Is Constitutionally Permissible Where Its Purpose and Effect Is to Overcome the Effects of Societal Discrimination.*

Despite the fact that the Fourteenth Amendment itself originated as a measure to promote integration and eliminate racial inequalities, *Palmer* v. *Thompson*, 403 U.S. 217, 220 (1971); *id.* at 240 (White, J., dissenting), the majority below drew from the Equal Protection Clause a rule which, as a practical matter, virtually forbids recognition of the special situation of minority applicants. As the dissenting justice pointed out, the logic of the majority's position would preclude the medical school even taking affirmative steps to recruit minority applicants, 553 P.2d at 1177-78 (Pet. App. p. 26a), a practice which this Court approved in *Washington* v. *Davis*, *supra*, 426 U.S. at 246.

This result cannot be the command of the Fourteenth Amendment. The pervasive effects of this nation's sad history of racial discrimination have received the widespread attention of courts and legislatures. In many contexts drastic measures have proven necessary to eliminate lingering discriminatory "systems and effects." H. Rep. No. 92-238, 92d Cong., 1st Sess. 8 (1972) (employment discrimination). *See also South Carolina* v. *Katzenbach*, 383 U.S. 301, 327 (1966) (voting rights). And this Court has authorized and even required race-conscious remedies in a variety of corrective settings. *See, e.g., United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 97 S. Ct. 996 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *Swann* v. *Charlotte-Mecklenberg Board*

of Education, 402 U.S. 1 (1971); *United States* v. *Louisiana*, 380 U.S. 145 (1965). Preferential treatment of minority groups is recognized in many situations to be the only effective means of overcoming persistent disadvantages. *E.g., Kahn* v. *Shevin*, 416 U.S. 351 (1974) (widows benefits); *Lau* v. *Nichols*, 414 U.S. 563 (1974) (remedial education); 24 C.F.R. § 200.600 (housing); E. O. 11246, pt. II, 3 C.F.R., 1964-1965 Comp. 339, *as amended* by E. O. 11375, 3 C.F.R., 1966-1970 Comp. 684 (employment of minorities by federal contractors). *See also Morton* v. *Mancari*, 417 U.S. 535 (1974) (employment of reservation Indians in the Bureau of Indian Affairs).

There is no reason, constitutional or otherwise, that the University should first have to be adjudged guilty of discrimination before being permitted voluntarily to take steps toward overcoming the lingering effects of societal discrimination: "the permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment." *United Jewish Organizations* v. *Carey*, 97 S. Ct. at 1007. This Court has approved voluntary efforts to remedy segregation in schools, in cases where such efforts could not be judicially compelled. *See, e.g., Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971); *Nyquist* v. *Lee*, 402 U.S. 935 (1971), *aff'g* 318 F. Supp. 710 (W.D.N.Y. 1970).

In other cases this Court has recognized the constitutional propriety of preferential treatment for groups which have been the subject of general *societal* discrimination, most recently in *Califano* v. *Goldfarb*, 97 S. Ct. 1021, 1028 n.8 (1977), and *Califano* v. *Webster*, 97 S. Ct. 1192 (1977) (*per curiam*). And there is no suggestion in any of these cases that an adjudication of fault must accompany every contribution to overcoming entrenched patterns of discrimination and segregation. While the culpability of an employer or school admissions committee

may well affect the equity of judicial imposition of preferential relief, there can be no constitutional or indeed rational basis for distinguishing between culpable and nonculpable defendants when the issue is the permissibility of their voluntary remedial acts.[5]

D. *The Fact That the Special Admissions Program May Impose Some Disadvantage on Individual Members of Groups Not Directly Benefitted by the Program Is Not Sufficient to Make the Program Invalid.*

The majority below distinguished those cases in which this Court has upheld the preferential use of racial criteria on the grounds that such preferences had not deprived nonminorities of "benefits which they would otherwise have enjoyed." 553 P.2d at 1160 (Pet.App. p. 13a). While stating that school desegregation decisions may "discommode" nonminorities "by requiring some to attend schools in neighborhoods other than their own," the court found it constitutionally significant that the racial classifications in those cases did not "totally deprive" any child of an education and subjected members of all races to essentially equivalent treatment. *Id.*

It is clear that the effect of the special admissions program is to impose costs on some individuals who do not

[5] Various lower courts have upheld employment quotas pursuant to federal contracting requirements without any demonstration that the affected employer had previously engaged in discriminatory practices. *E.g., Associated General Contractors of Mass., Inc.* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Southern Illinois Builders Ass'n* v. *Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). Similarly, voluntary adoption of preferential programs was sanctioned in *Porcelli* v. *Titus*, 431 F.2d 1254 (3d Cir. 1970).

meet the racial criteria used. It is less clear why those costs appeared to the court below to overstep a constitutional line. This Court recently held that detrimental effects upon the expectations of nonminority employees did not render invalid an order for remedial assignment of seniority benefits to minority employees. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 775-77 (1976).

It is in the very nature of the problem of allocating scarce public resources that all will not be fully served and some will be denied access entirely. If the use of racial criteria is not *per se* unconstitutional, the determination of the University as to the criteria for allocating places in its medical school must be given considerable deference. In designing and implementing its remedial program, the University was aware of the need to balance its strong interests in increasing minority enrollment against possible intrusion on the expectations of others. In so doing, it was entitled to " 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair, and what is workable.' " *Teamsters* v. *United States*, 45 U.S.L.W. 4506, 4519 (May 31, 1977), quoting from *Lemon* v. *Kurtzman*, 411 U.S. 192, 201, 200 (opinion of Burger, C. J.). And it is important to point out that while the court below characterized the cost to the plaintiff as an "absolute denial," 553 P.2d at 1161 (Pet. App. p. 14a), he was in fact, like all other applicants, fairly considered for admission to medical school *by the school's own standards.* As we have argued, that those standards include consideration of an applicant's race is, under these circumstances, permissible; the fact that this results in fewer places being available for the nonpreferred majority does not work an injury of constitutional dimension to the aspirations of that class, or of any member of it.

III. The Details of the Specific Special Admissions Program Adopted by Davis Do Not Make It Constitutionally Objectionable.

We have demonstrated that the type of special admissions program adopted by Davis is necessary to accomplish important state and national objectives and is constitutionally valid. Nor is there anything about the details of the specific program that should change this result. As this Court has repeatedly recognized, public school authorities must be afforded wide discretion in determining and enforcing the standards governing the academic processes. *See, e.g., Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968). The importance of the interests served by such programs as that challenged in this case requires that they not be made subject to the constant threat of federal litigation. Otherwise, it is predictable that they will not be adopted at all, in any form, by most professional schools, and the result will be further frustration and delay in realizing "the promise of *Brown*." *See North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971).

A. *The Existence of a Separate Admissions Track Does Not Invalidate the Program.*

The existence of a separate admissions committee to screen and evaluate candidates for special admission serves valid administrative purposes and does not reflect adversely on the overall validity of the special admissions program. The program is designed to benefit minorities who have suffered most, both economically and educationally, from past discrimination, and is narrowly drawn to assist that class alone. *Cf. Kahn* v. *Shevin*, 416 U.S. 351, 360 (1974) (Brennan, J., dissenting). Indeed, minority applicants with no history of disadvantage are referred to the regular admissions program. R. 65-66,

170.[6] In any event, final selection of special admissions applicants, like applicants in the regular admissions process, is made by the full admissions committee. R. 166. The only difference in the procedure employed by the two committees is that, in selecting candidates to be interviewed, the special admissions committee does not employ an arbitrary grade point average cut-off figure. R. 175. The court below conceded that

> "we are aware of no rule of law which requires the University to afford determinative weight in admissions to these quantitative factors. In practice, colleges and universities generally consider matters other than strict numerical ranking in admission decisions. (O'Neil, *Preferential Admissions* (1971) 80 Yale L.J. 699, 701-705). The University is entitled to consider, as it does with respect to applicants in the special program, that low grades and test scores may not accurately reflect the abilities of some disadvantaged students; and it may reasonably conclude that although their academic scores are lower, their potential for success in the school and the profession is equal to or greater than that of an applicant with higher grades who has not been similarly handicapped." 553 P.2d at 1166 (Pet. App. p. 24a).

These are, in fact, precisely the considerations which informed the judgment of the University and its officials in establishing and administering the special admissions program in this case. To hold that the University is constitutionally disabled from applying a different measure of qualification to individuals whose backgrounds suggest a less dependable applicability of the usual standards, is effectively to constitutionalize the notion of merit embodied in standardized tests like the MCAT.

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[6] "R." references are to the pages of the clerk's transcript of the record filed in the court below.

B. *The Use of Numerical Goals for Minority Admissions Does Not Invalidate the Program.*

The decisions of this Court and of the lower federal courts leave little doubt that numerical goals of themselves are not constitutionally infirm. In Title VII cases, the circuit courts have been virtually unanimous in "requir[ing] employers to hire according to ratios of minority to white employees" in order to redress the effects of past discrimination. *See* Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 Mich. L. Rev. 1, 9 and nn. 41-44 (1975) (citing cases). In the school desegregation cases, this Court similarly has sanctioned the use of "'fixed mathematical' ratios." *United States* v. *Montgomery Board of Education*, 395 U.S. 225, 234, 235-36 (1969). It has sanctioned their use, moreover, not only in remedial judicial orders, but in voluntary administrative programs. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), this Court acknowledged the validity of a discretionary judgment by school authorities that "in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." *Id.* at 16. And in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 97 S. Ct. 996 (1977), this Court recently upheld the use of "specific numerical quotas" to establish a fixed number of black majority voting districts. *Id.* at 1008.

The use of numerical guidelines, secondly, is peculiarly innocuous in the case at bar. The University's targeted percentages are flexible: they have varied between 8%, 12%, and 16% in the six years the program has operated. There is no suggestion that the University's goals set a *ceiling* on minority enrollment. Indeed, the 16% goal applies only to disadvantaged minority applicants: the court below noted that six Mexican Americans, one black and 41 Asians were admitted between 1971 and 1974 through the regular admissions program. 553 P.2d at 1165 n.21. Nor does the 16% goal represent a mandatory requirement which must be filled regardless of qualifications. In at least one of the years under consideration, only 15 minorities were admitted under the special admissions program. R. 216-18.

Perhaps more fundamentally, numerical goals are necessarily implicated in any racially preferential program. *See United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 97 S. Ct. 996, 1008 (1977). Once it is decided that minorities should be preferred, the magnitude of that preference must be gauged. Once it is decided that minorities are underrepresented, the size of that underrepresentation must be assessed. Once it is decided that minorities' test scores should be discounted, the magnitude of that discount must be determined. "In deciding how many bonus points to give," in short, "there is no escape from setting some goal for the number of minority students in the entering class." Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 Va. L. Rev. 955, 971 (1974). To permit racially preferential admissions programs, and to acknowledge that officials administering them inevitably must entertain notions as to their proper goals, but to forbid those officials, on constitutional grounds, to make these goals plain for all to see, is to encourage nothing healthy in the law. Here, as before, the question reduces to one of disingenuousness. Here, as elsewhere, disingenousness is to be avoided.

CONCLUSION

Wherefore we respectfully submit that the decision and judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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